83 - 1422

No.

In The

SUPREME COURT OF THE UNITED STATES

February Term, 1984

City Of Pleasanton, et al.,

Appellants,

vs.

Travis J. Smith, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

APPENDICES TO THE JURISDICTIONAL STATEMENT

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APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

For The Western District of Texas
San Antonio Division

Travis J. Smith, Et al,

v.

City of Pleasanton, Et al.

Civil Action No. SA-83-CA-1678

MEMORANDUM OPINION

Before Reavley, Circuit Judge, Shannon and Garcia, District Judges.

SHANNON, District Judge:

This case concerns the issue of compliance with Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1981). Three city council members filed a complaint seeking to halt or declare

invalid an election held in the City of Pleasanton to recall one of the Plaintiffs, City Councilman Travis Smith. Plaintiffs claim that the recall provision contained in Article XII of the city's newly adopted Home Rule Charter had not been precleared by the Justice Department pursuant to the Voting Rights Act and that, therefore, the result of the recall election which took place on August 13, 1983, was void.

The crucial issues are two-tiered. The first is whether the City of Pleasanton submitted Article XII of its Home Rule Charter to the Justice Department for preclearance under the Voting Rights Act. If, indeed, it was submitted, then the Court must determine whether the Attorney General interposed an objection to Article XII. For reasons which follow, this Court holds that Article XII of the proposed Home Rule Charter for the City of Pleasanton was not properly submitted to the Justice Department, but that if it was, the Justice Department made objec-

tion to it. The recall election held pursuant to its terms in August of 1983 is, therefore, invalid.

Prior to 1982, the City of Pleasanton was organized under the General Laws of Texas and had no provision for recall of council members. City council members were elected by a plurality vote which had made possible the recent election of two Mexican-American members to the five member council.[1]

In 1980, city voters elected a group of citizens to draft and present to the voters a home rule charter as authorized by Texas law. The Home Rule Charter Drafting Commission presented the proposed charter to the City Council on May 17, 1982. On May 25, 1982, City Manager Don Savage sent a letter and two copies of the proposed Home Rule Charter to the Justice Department for preclear-

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[1]The City of Pleasanton, with a population of approximately 6,000 people, has an ethnic composition that is 60% Anglo and 40% Mexican-American.

ance. The cover letter was entitled, "Re: Submission Under Section 5, Voting Rights Act Requesting Attorney General's Review of Article XI,[2] Section 5, of Proposed Home Rule Charter of the City of Pleasanton." The letter dealt solely with a proposed change in the manner of electing the mayor and affirmatively stated, "It is emphasized that the proposed change affects only the mayor's position and that the five at-large council members will continue to be elected by plurality under the proposed charter."

The Justice Department responded with a letter dated July 26, 1982, which acknowledged receipt of the proposed charter and determined that the City had not sent sufficient information to enable the department to properly evaluate the proposed charter. The letter focused on majority election of the mayor and the

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[2]Article XI, § 5 deals with the election of mayor by majority vote and is to be distinguished from Article XII, the recall provision upon which this controversy is centered.

implementation of numbered positions for council members. Both issues spring from Article XI, Sections 5 and 4 respectively. In requesting additional information, the Justice Department's letter specifically required the City to: "8. Indicate any other voting changes contained in the submitted charter. Reason for adoption of those changes." The City Manager's letter in response, dated August 9, 1982, bore the same heading with reference to Article XI as did the letter of May 25. City's answer to the Justice Department's eight item request for indications of other changes was: "No other changes affecting voting rights are proposed." When asked to explain this statement at the trial, Mr. Savage testified that he did not perceive the proposed recall provision to be a change.

On October 14, 1982[3] the Justice Department objected to the City charter's implementation of numbered council positions as having the effect of diluting the minority vote. After the objection was interposed, the City Council passed an ordinance which eliminated numbered positions in city council elections and reinstituted election by plurality. Throughout this entire procedure no discussion or correspondence concerning the new recall provision took place. Section 5 of the Voting Rights Act requires states and political subdivisions to submit to the Attorney General for evaluation any legislation which alters existing voter rights or regulations.[4] The United

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[3]The fact that the Justice Department did not object until the 60-day time period had apparently run is of no consequence in this case because the City waived this defense when it responded to the objection by voluntarily attempting to remedy the defect.

[4]City of Rome v. United States, 446 U.S. 156, 169 (1980) (explaining which political units are subject to section

(continued)

States Supreme Court in Allen v. State Board of Elections[5] required that the legislation in question be submitted "in some unambiguous and recordable manner."[6] The Justice Department has developed rules and regulations governing the required contents of a submission of proposed voting changes.[7] Every submittal must include a copy of the document which contains a change affecting voting.[8]

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five preclearance procedures as determined in United States v. Board of Commissioners of Sheffield, Ala., 435 U.S. 110, 117-118 (1978)). For a definition of "political subdivision" see section 14(c)(2) of the Voting Rights Act as set forth in 42 U.S.C.A. § 1973l (West 1981).

[5]Allen v. State Board of Elections, 393 U.S. 544 (1969).

[6]Id. at 571.

[7]46 Fed. Reg. 875 (1981) (to be codified at 28 C.F.R. § 51.25).

[8]Id. § 51.25(a). The full text of subsection (a) requires: "A copy of any ordinance, enactment, order or regulation embodying a change affecting voting." Id.

Moreover, if "the change affecting voting is not readily apparent on the face of the document"[9] the state or political subdivision must also include "a clear statement of the change explaining the difference between the submitted change and the prior law or practice."[10] Further requirements include "(m) a statement of the anticipated effect of the change on members of racial or language minority groups."[11]

The adoption of a provision for recall by majority vote where none has

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[9] Id. § 51.25(b). The full text of subsection (b) states:

> If the change affecting voting is not readily apparent on the face of the document provided under paragraph (a) or is not embodied in a document, a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting. Id.

[10] Id. § 51.25(b).

[11] Id. § 51.25(m).

previously existed constitutes a change in a standard, practice or procedure with respect to voting under the Voting Rights Act. Such a change should have been submitted to the Attorney General for preclearance in an unambiguous and recordable manner. Unambiguous and recordable manner means that the Court can look at the record of transaction--the correspondence and documents--and can with clarity ascertain that the Justice Department's attention has been directed to the proposed change. Such is not possible in this case. The burden clearly rests upon the City to point out changes.[12]

Buried in a thirty-one page charter containing nineteen articles, the recall provision is a change not readily apparent on the face of the document. The City failed to comply with federal regulation § 51.25 by not submitting a clear statement of the difference between Article XII and the prior law. The sub-

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[12]See Allen v. State Board of Elections, 393 U.S. 544, 571 (1969).

mission cover letter of May 25, 1982, in its opening sentences clearly centers the Justice Department's attention on a totally different provision of the Charter.

> The enclosed proposed Home Rule Charter of the City of Pleasanton has been submitted for your review due to the fact that Article XI, Section 5, of the charter changes the method of electing the mayor . . . It is emphasized that the proposed change affects only the mayor's position . . . .

An even more serious distraction from the recall provision is found in the City's response of August 9, 1982, to the Justice Department's request for additional information. In this letter, the City leads the Justice Department away from Article XII when it responds to item 8 by affirmatively stating that "No other changes affecting voting rights are proposed." The City Manager testified at trial that he did not perceive the recall provision as a change affecting minority voting rights. While this statement

tends to show that there was no bad motive on the part of the City, it also supports the Plaintiffs' argument that no proper submittal of the recall provision occurred.

Even if one might conclude that Article XII was properly submitted, one must also conclude that objection to it was made. The Attorney General specifically objected to the implementation of numbered positions for council members because such a change would have allowed majority voters to elect every position on the council whereas a plurality at-large election permitted minority voters to elect two-fifths of the council. In essence, the Attorney General objected to majority control of the election process. Recall by majority as provided in Article XII runs afoul of this objection.

In its attempt to get preclearance following the objection, the City rejected that portion of the charter which set out the manner of election of council members by passing an ordinance

re-establishing at-large election by plurality vote. The City cannot now rely on its charter in order to execute an "end-around" attack upon the principle that city council elections shall not be controlled by the majority.

APPENDIX A-2

IN THE

UNITED STATES DISTRICT COURT

For The Western District of Texas
San Antonio Division

Travis J. Smith, Et al,

v.

City of Pleasanton, Et al.

Civil Action No. SA-83-CA-1678

REAVLEY, Circuit Judge, dissenting:

The sole issue before this court is whether the proposed charter for Pleasanton was "submitted" to the Attorney General for preclearance of its voting procedures under 42 U.S.C. § 1973c (1976). The City Manager of Pleasanton submitted the entire proposed charter under a May 25, 1982 cover

letter that began, "The enclosed proposed Home Rule Charter of the City of Pleasanton has been submitted for your review. . . ." Sixty-two days later the Justice Department responded with a letter stating, "This is in reference to the August 14, 1982 referendum election for the proposed city charter . . . submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965. . . ." I have no doubt that the city officials thought they were submitting the whole charter for preclearance. It also seems clear that the Justice Department thought they were reviewing the entire charter.

Although the city's cover letter stated that the "charter of the City of Pleasanton has been submitted for your review due to the fact that Article XI, Section 5, of the charter changes the method of electing the mayor," the Justice Department reviewed the method of electing council members and this change was not specifically pointed out to the department by the City of

Pleasanton. This voluntary review by Justice of a provision not specifically pointed out for review suggests to me that the Attorney General recognizes his burden to locate changes in government that may affect voting rights.

The Voting Rights Act protects one of our most fundamental rights--the right to participate in our government. It serves a noble ideal, but is a clumsy and cumbersome law to enforce. To review within sixty days of submission all questions of compliance with federal standards of all changes by every city, county or other governmental body in the nation is an onerous assignment. But that is part of the scheme Congress has provided--and for good cause.

We cannot realistically expect a city such as Pleasanton with a population of 6,000 and without a full time city attorney to identify subtle nuances of polity that may affect voting rights. I doubt, for example, that many well-intentioned officials would recognize the right to recall an elected official

by majority vote as a change affecting voting rights and patterns. I doubt that it would be wise to place the responsibility for identifying changes in voting procedures with the city and county officials. Congress specifically provided that the Attorney General pre-clear laws affecting voting rights and procedures. If we limit the review of these procedures to those portions of the proposed legislation highlighted by the local governmental entity, we ensure much delay and defeat a major objective of the review. Congress intended to eliminate the need to file a declaratory judgment action to determine that proposed legislation was valid under the voting rights act. Morris v. Gressette, 432, U.S. 491, 503 (1977). The delay attendant to such legal action would be unduly burdensome. Instead, Congress provided for a more expeditious review of election procedures through an administrative review by the Attorney General. 42 U.S.C. § 1973c (1981). Even under this method, Congress feared

the effects of delays in the review. Postponing implementation of the legislation was therefore to cease within a fixed time limit[1] to provide some degree of finality and certainty to the review.

For this reason the Supreme Court has held that the Attorney General's failure to impose a timely objection based on a complete submission would not postpone implementation of the state legislation. Morris v. Gressette, 432 U.S. at 504. Through its silence on a provision such as the recall provision, the Justice Department waives its right to delay implementation of the provision. This does not mean that the provision has been upheld under the Voting Rights Act. The statute expressly provides that preclearance shall not bar

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[1]42 U.S.C. § 1973c (1981) provides that the Attorney General must make an objection within sixty days of submission. This time limit may be extended to allow sixty days for review from the date a complete submission, including new information requested by Justice, is tendered. Georgia v. United States, 411 U.S. 526, 539-540 (1973).

subsequent action to enjoin enforcement. Id. at 505. The presumption, however, is that the legislation may be implemented upon Justice's failure to object within the prescribed time limit and may be subsequently challenged only through judicial action.

Such a rule is essential to the operation of local governments under the Voting Rights Act. Local governments need a reasonably high degree of certainty that their proposed laws can be validly implemented. To hold that only those portions of the charter referenced in the city's cover letter received preclearance brings into question the validity of all other actions the city has taken under its new charter. Unless local governments can assume some finality of review from preclearance many election laws will be left open to uncertainty. This uncertainty is precisely what Congress sought to avoid.

This case should be decided on the basis of two simple questions: (1) was the charter formally submitted

to the Attorney General for preclearance review; and (2) was the Attorney General given an opportunity to object to proposed election procedures within the statutory time limits. I believe both requirements were satisfied.

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

For The Western District of Texas
San Antonio Division

Travis J. Smith, Et al,

v.

City of Pleasanton, Et al.

Civil Action No. SA-83-CA-1678

ANNOUNCEMENT OF DECISION

On this afternoon of the 7th day of October, 1983, the Court announced that it had concluded that Article XII of the proposed Home Rule Charter for the City of Pleasanton, Texas, had not been properly precleared by the United States Department of Justice and that therefore the recall election held pursuant to its terms in August of 1983 was invalid.

Judge Reavley dissented from this decision. The parties shall tender appropriate forms of judgment, and opinions will be prepared and filed by the Court in due course.

Signed and Entered this 7th day of October, 1983.

Fred Shannon,
U.S. District Judge

FOR THE COURT

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT

For The Western District of Texas
San Antonio Division

Travis J. Smith, Et al,

v.

City of Pleasanton, Et al.

Civil Action No. SA-83-CA-1678

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law filed herein:

It is ordered, adjudged and decreed that the Defendants, City of Pleasanton, Texas, and Danny Qualls, as Mayor of said City, and each of them, their agents, officers, employees, successors, and persons acting in concert

with them are enjoined from removing the Plaintiff, Travis J. Smith, from the office of Councilman, City Council, City of Pleasanton, Texas, on the basis of a recall election held against said Plaintiff in the City of Pleasanton, Texas, on or about August 13, 1983, or in any way interfering with his use, occupancy and enjoyment of said office during the balance of the term to which he had been elected on such basis.

It is further Ordered that the defendant Clem Titzman is dismissed from this cause as of October 7, 1983, on Plaintiff's motion made in open court on that date due to the mootness of the cause as to him.

Costs are taxed against the defendant, City of Pleasanton, Texas.

ORDERED this 21st day of November, 1983.

Fred Shannon,
U.S. District Judge
Western District of Texas

H.F. Garcia,
U.S. District Judge
Western District of Texas

Thomas M. Reavley,
U.S. Court of Appeals
Circuit Judge, Fifth
Circuit

APPENDIX D

IN THE

UNITED STATES DISTRICT COURT

For The Western District of Texas
San Antonio Division

Travis J. Smith, Et al,

v.

City of Pleasanton, Et al.

Civil Action No. SA-83-CA-1678

NOTICE OF APPEAL

Notice is hereby given that DANNY QUALLS and CLEM TITZMAN, Defendants in the above entitled cause, hereby appeal to the Supreme Court of the United States from the entire Judgment entered by this Court on November 21, 1983, dismissing Clem Titzman from this cause, enjoining Defendants from removing Travis Smith from the office of Councilman, City

Council, City of Pleasanton, Texas, on the basis of a recall election held on August 15, 1983, where Smith was recalled or in any way interfering with his use, occupancy and enjoyment of office during the balance of his term and declaring invalid the recall provision of the Home Rule Charter of the City of Pleasanton on the basis that it was not precleared in compliance with the Voting Rights Act of 1965, 42 U.S.C. § 1973(c) (1981). This appeal is taken under 28 U.S.C. § 1253.

Date: December 29, 1983

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By _____
Robert M. Roller

ATTORNEYS FOR CLEM TITZMAN AND DANNY QUALLS

APPENDIX E

SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, 42 U.S.C. § 1973c

In relevant part Section 5 provides: "[W]henever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in

section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced, without such proceeding if the qualification, prerequisite, standard, practice or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made." 89 Stat. 400, 404, 42 U.S.C. § 1973c.